No. 89-373 (3)

IN THE

Supreme Court of the United States

October Term, 1989

ALABAMA POWER COMPANY, *et al.*,

Petitioners,

against

ENVIRONMENTAL DEFENSE FUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Questions Presented

1. Whether the court below exceeded its jurisdiction under § 304 of the Clean Air Act by ordering the Agency to make a decision on whether to revise a national air quality standard in accordance with a statutory requirement that it do so at five year intervals.

2. Whether the court below imposed procedures beyond those required by statute where, in advance of the court's ruling, the Agency voluntarily undertook notice and comment procedures.

Table of Contents

TABLE OF AUTHORITIES

Page

FEDERAL STATUTES

FEDERAL REGULATIONS

Page

MISCELLANEOUS

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Statement of the Case

This case arises under §§ 109 and 304 of the federal Clean Air Act ("Act"). 42 U.S.C. §§ 7409, 7604. Seven states and four national citizen groups ("respondents") filed a § 304 "citizen suit" against the Administrator of the Environmental Protection Agency ("EPA"), seeking an order requiring him to revise the secondary National Ambient Air Quality Standard ("standard" or "NAAQS") for the

pollutant sulfur oxides ("SO_x") or promulgate a new standard for the pollutant sulfate (which is one of the oxides of sulfur), or, in the alternative, require the Administrator to conduct a rulemaking to determine whether the NAAQS should be revised.

Respondents sought to enforce non-discretionary duties imposed on the Administrator of the U.S. Environmental Protection Agency by § 109. Subsections 109(b)(1) and (2) direct that NAAQS be set at the levels requisite to protect public health with an ample margin of safety and to protect the environment from all adverse effects of sulfur oxide emissions.

The statutory provisions at issue were enacted in 1970 and amended in 1977. In 1970, Congress completely overhauled the nation's Clean Air Act legislation, "to provide a much more intensive and comprehensive attack on air pollution," which it acknowledged as a "critical and growing national problem." S. Rep. No. 1196, 91st Cong., 2d Sess. 4 (1970) (hereinafter "1970 Senate Report"). One purpose of the legislation was to "sharply increase federal authority and responsibility in the continuing effort to combat air pollution." *Train v. Natural Resources Defense Council,* 421 U.S. 60, 63-64 (1976). The 1970 amendments reflected Congress' dissatisfaction with progress under pre-existing air pollution laws and were a "drastic remedy" to what was perceived as a "serious and otherwise uncheckable problem." *Union Electric Co. v. Environmental Protection Agency,* 427 U.S. 246, 249, 256 (1976).

An additional purpose of the 1970 Act was to "expedite the establishment and implementation of air quality stand-

ards," which prior law had failed to accomplish. 1970 Senate Report at 1, 10.[1]

Once the Administrator determines that an air pollutant (or class of pollutants) "may reasonably be anticipated to endanger public health or welfare," the Act requires him to place it on a list of regulated pollutants and to develop Air Quality Criteria ("Criteria"). 42 U.S.C. § 7408(a)(1)(A). The listing of the pollutant and the development of the Criteria are the first steps leading to establishment of National Ambient Air Quality Standards for that pollutant.[2] 42 U.S.C. § 7408(a)(2). The Air Quality Criteria must "reflect the latest scientific knowledge" and "all identifiable effects on public health and welfare" from the pollutant. *Id.* The national standards are required to be "based on" the Criteria. 42 U.S.C. § 7409(b)(2).[3]

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[1]Before 1970, the states had responsibility to set air quality standards "on the basis of criteria set forth by the secretary [HEW]." H.R. Rep. No. 1146, 91st Cong., 1st Sess. 1-2, *reprinted in* 1970 U.S. Code Cong. and Admin. News 5356-57. With the passage of the 1970 amendments, Congress imposed upon the Administrator the duty to set the national standards. 42 U.S.C. § 7409(a).

[2]The NAAQS are variously described as the "heart" or "cornerstone" of the Act. *Train v. NRDC, supra,* 421 U.S. at 66; testimony of Administrator Russell Train to the Subcommittee on Health and Environment, March, 1975, *reprinted in* 8 A Legislative History of the Clean Air Act Amendments of 1977, at 7190 (1979). The standards are expressed as a limitation on the concentration of a pollutant or pollutant class in the ambient air. *See,* 42 C.F.R. §§ 50.4, 50.5. The setting of a national standard triggers obligations upon the states to develop and implement air pollution control plans designed to achieve the standards. 42 U.S.C. § 7410(a)(2)

[3]Section 109(a)(1) of the 1970 Act directed EPA to publish proposed regulations prescribing national "primary" and "secondary" ambient air quality standards for each pollutant for which Air Quality Criteria has been issued under prior law. 42 U.S.C. § 7409(a)(1). At issue in this appeal is the National Secondary Ambient Air Quality Standard relating to the pollutant class known an sulfur oxides, for which EPA first issued Air Quality Criteria in 1969, and revised Criteria in 1982 and 1984.

The Act states that in establishing any secondary standard the EPA Administrator:

> . . . *shall* specify a level of air quality the attainment and maintenance of which in the judgment of the administrator, based on such criteria, is requisite to protect the public welfare from *any* known or anticipated adverse affects associated with the presence of such air pollution in the ambient air.

42 U.S.C. § 7409(b)(2) (emphasis added). The Act defines the term "welfare" to include all conceivable effects of a pollutant on the natural and manmade environments. 42 U.S.C. § 7602(h).

The 1970 Act did not impose a schedule for revision of the standards to account for improved knowledge of the effects of the pollutant. It did, however, require EPA to revise the Criteria from time to time, 42 U.S.C. § 7408(c).

The absence of a regular schedule for reviewing, and if appropriate, revising the standards was recognized as a defect at the time of the 1977 Clean Air Act amendments.[4] Consequently, § 109(d)(1) was added. This subsection requires review and revision of the standards every five years.

> Not later than December 31, 1980, and at five year intervals thereafter the Administrator *shall* complete the thorough review of the criteria published under § 7408 of this title and the national

[4]H.R. Rep. No. 294, 95th Cong., 1st Sess., 10, 182, 338-339, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1088, 1261, 2805-6; Senate Rep. No. 127, 95th Cong., 1st Sess. 16, *reprinted in* Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1977, Vol. 3 at 1390; H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess., 124 *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1505.

> ambient air quality standards promulgated under this section and *shall* make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The administrator may review and revise criteria or promulgate new standards earlier or more frequently than *required* under this paragraph.

42 U.S.C. § 7409(d)(1) (emphasis added).

EPA established the national standards for sulfur oxides in 1971 and has not revised them since then, except to delete the secondary standard in 1973.[5] *See,* opinion of the Court of Appeals, reprinted in the Appendix, at 6a (hereinafter referred to as "App. ____"). App. 4a, 6a, 7a. The 1971 standards expressly were not established to protect against the acid rain and regional, haze effects of sulfur oxides. App. 4a, 6a-7a.

To comply with the 1977 amendments to § 109, EPA should have completed review and made a decision on whether to revise the sulfur oxides standards in 1980 and 1985 and be preparing for a third round in 1990. Contrary to the statements in the petition, EPA has never made any formal decision on whether to revise the standards. EPA did not complete first review of the sulfur oxide standards until 1982 when it published its revised criteria documents.

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[5]Sulfur oxides were the subject of a Criteria document issued by the Secretary of HEW (the predecessor of the Administrator) in 1969. At the direction of Congress in § 109(a)(1), EPA set National Ambient Air Quality Standards for sulfur oxides in 1971, which were thereafter revised in 1973. 42 U.S.C. § 7408(a)(1); 36 Fed. Reg. 1502 (January 30, 1971); 38 Fed. Reg. 25679 (September 6, 1973).

The Administrator revised the air quality Criteria for sulfur oxides in 1982 and again in 1984. He did not, however, publish any proposed action with regard to the sulfur oxides national standards at that time. *See,* 42 U.S.C. § 7409(a)(2). Thus, the national standards for sulfur oxides have not been revised for sixteen years.

Those documents identified acid rain and regional haze conditions as adverse environmental effects of sulfur oxide emissions. Nevertheless, EPA failed to revise the standards to address these effects.[6]

Since 1970, Congress has empowered district courts (upon commencement of the civil action by any person) to order the Administrator to "perform any act or duty under this chapter which is not discretionary with the Administrator . . ." 42 U.S.C. § 7604. The right to bring a citizen suit in district court to compel EPA action under § 304 is distinct from the right to seek judicial review of agency action. The right of judicial review is provided in § 307 which grants to the Court of Appeals power to review

> . . . promulgation of any national primary or secondary air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter . . .

42 U.S.C. § 7607(b)(1). This case seeks performance of the Administrator's duty to set a secondary standard to protect against adverse effects on the environment not previously addressed by the Administrator under the Act. Plaintiffs

[6]In its review of the particulate matter standard, EPA specifically identified visibility impairment and acid rain as adverse effects of sulfur dioxide and its chemical derivative, sulfate particles. 52 Fed. Reg. 24646, 24670 (July 1, 1987). The statement to the contrary in the petition is flatly wrong. *See, Alabama Power* petition at 6, note 16. EPA's refusal to set a standard for these effects in that rulemaking was not based on an inability to decide whether visibility was an adverse effect of sulfur oxide emissions. Rather, it was based on the Agency's choice of regulatory timing in dealing with visibility effects and on an alleged inability to devise a standard to address acid rain. An appeal of that final EPA decision is pending in the U.S. Court of Appeals for the D.C. Circuit in *NRDC v. Thomas*, Case No. 87-1438 (oral argument scheduled for December 14, 1989).

below did not seek review of any final agency action since the Administrator had not taken any action with regard to these adverse effects.

Decisions Below

On April 19, 1988 the district court (Edelstein, J.) dismissed the action (on cross motions for summary judgment) finding that it lacked subject matter jurisdiction because the Administrator had no non-discretionary duty under § 109 to revise the national standard for sulfur oxides to protect the environment. *Environmental Defense Fund v. Thomas,* No. 85-CV-9507 (S.D.N.Y., April 19, 1988).

Judge Edelstein ruled that § 109 imposes a non-discretionary duty on the Administrator to "review" the standards at five year intervals—but no duty to revise them "even if the EPA had found the existing standards inadequate," because revision of the standards involves an exercise of discretion and expert judgment. App. 38a. The court concluded that, pursuant to § 307, any challenge to the failure of the Administrator to set national standards must be presented to the United States Court of Appeals for the District of Columbia Circuit. App. 38a.

On appeal, the Second Circuit reversed in part and affirmed in part. *Environmental Defense Fund v. Thomas,* 870 F.2d 892 (2d Cir. 1989). The court rejected EPA's argument and the holding of the district court that EPA may "stand pat, deciding neither to revise the NAAQS or to make a public decision that revision is necessary." App. 9a. In reversing the district court, it held that § 109(d) imposed a nondiscretionary duty upon the EPA Administrator to make *some* decision regarding revision of the NAAQS." App. 9a, 18a (emphasis in original). The court further held

that enforcement of that non-discretionary duty lies in the district court under § 304.

The Second Circuit affirmed the district court's refusal to order EPA specifically to revise the national standard for sulfur oxides to protect against acid rain and visibility effects. It held that, "The substance of the Administrator's decision is beyond the power of the district court, . . . its authority being limited to ordering the Administrator to make a formal decision." App. 9a.

Central to the court's holding that EPA has a nondiscretionary duty to make *some* decision are the "shall" language and deadlines imposed upon the Administrator in § 109(d). App. 6a, 17a. The Second Circuit found that the Congressional intent on this matter was "clear." App. 17a. To hold that this claim did not fall within the citizen suit provision of § 304 would, the court said, "[leave] the matter in bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." App. 17a. Such a result, the court reasoned, could not be countenanced:

> No discernible congressional purpose is served by creating such a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion.

App. 17a. Thus, the Second Circuit ordered the Administrator to complete the notice and comment procedures he voluntarily undertook nearly a year before the Court of Appeals decision. *See,* 53 Fed. Reg. 14926 (April 26, 1988). The Second Circuit recognized that without such an order there would be no assurance that the Administrator would reach a final decision, thereby frustrating the Congressional purpose to protect public health and welfare from air pollution.

ARGUMENT

I.

THE DECISION OF THE SECOND CIRCUIT DOES NOT CREATE A CONFLICT WITH ANY DECISIONS OF THIS COURT OR OTHER CIRCUITS.

Petitioners claim that the decision of the court below is in conflict with this Court's decision in *Vermont Yankee Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978), and the decisions of the D.C. Circuit in *Oljato Chapter of the Navajo Tribe v. Train,* 515 F.2d 654 (D.C. Cir. 1975), and *Telecommunications Research and Action Center v. FCC,* ("TRAC"), 750 F.2d 70 (D.C. Cir. 1984). These claims are meritless.

A. There Is No Conflict With *Vermont Yankee* Because the Court Below Did Not Impose Procedures On the Administrator.

Petitioners complain that the court below ordered the Administrator to undertake rulemaking procedures in fulfilling his obligation to take some formal action regarding the NAAQS for SO_x. Petitioners claim that this "imposition" runs afoul of this court's decision in *Vermont Yankee* which prohibits courts from imposing procedural requirements on an agency in excess of those imposed by statute. 435 U.S. at 547-548. Petitioners' claim is based on a factual misstatement.

In this case, it was the Administrator, not the Second Circuit, who determined that notice and comment rulemaking procedures were appropriate. One week following the district court's decision dismissing the plaintiff's action (Edelstein, J.) the EPA Administrator published a "Proposed Decision Not to Revise the National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)"

in the Federal Register (53 Fed Reg 14926 [April 26, 1988]) and invited comments on the proposal from the public.

Furthermore, § 307 of the Clean Air Act specifically empowers EPA to adopt notice and comment procedures for this type of decision. The rulemaking procedures of § 307 apply to "the promulgation or revision of any national ambient air quality standard under section 109 . . ." and "such other actions as the Administrator may determine." 42 U.S.C. § 7607(d)(1)(A) and (N). The Administrator chose to publish his proposed decision in an informal rulemaking proceeding either because he felt that § 307(d)(1)(A) required it, or because he determined that it was appropriate to proceed in that fashion pursuant to § 307(d)(1)(N). The Second Circuit merely ordered the Administrator to make a final decision in the administrative process which he voluntarily commenced. Therefore, the decision of the Second Circuit decision is not inconsistent with *Vermont Yankee.*[7]

Alabama Power makes the absurd claim that the Second Circuit decision requires agencies to engage in a continuous "multitude" of rulemaking proceedings as it reviews evolving scientific information. Petition at 11, 14, 23. The Second Circuit determination does not have this effect. It merely enforces the § 109 requirement that EPA make a

[7]Contrary to petitioners' assertion, a final decision not to revise a NAAQS falls within the definition of a "rule" under the Administrative Procedures Act and can only be determined by way of rulemaking procedures. The decision not to revise the obsolete 1971 standards "jeopardizes the rights and interests" of the members of the public. *Environmental Defense Fund v. Gorsuch,* 713 F.2d 802, 815 (D.C. Cir. 1983). Retention of the existing standards has "general" and "particular applicability and future effect" because it guides the behavior of EPA and thousands of industrial air pollution sources for up to five years. Thus, it is a rule under 5 U.S.C. §551(4). But this issue was not before the Second Circuit. Nor is it properly before this Court, since EPA has already chosen to publish the proposed decision as a rule.

formal decision on whether to revise the standards, *every five years*. The Second Circuit did not usurp the Administrator's discretion by dictating when EPA should issue such decisions. Rather, Congress set the schedule in § 109 and empowered district courts to enforce it in § 304. 42 U.S.C. §§ 7409, 7604.

B. Unlike the Situation in *Oljato*, This Case Involves EPA's Failure To Perform a Non-Discretionary Duty Under the Clean Air Act.

Petitioners contend that the decision below conflicts with the decision of the D.C. Circuit in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975). Specifically, petitioners argue that respondents should have petitioned the agency for rulemaking to revise the NAAQS for SO_x, thereby resulting in the establishment of an administrative record for subsequent review by the D.C. Circuit. Petitioners' assertion, as the Second Circuit properly found, ignores the fundamental difference between the Agency's statutory duties in *Oljato* and the instant case. App. 10a, App. 11a.

The plaintiffs in *Oljato* sought review of whether EPA should exercise discretionary powers under § 111(b) of the Clean Air Act, which provided that EPA "may, from time to time, revise" the performance standards at issue there. 42 U.S.C. § 7411(b); App. 10a. Pursuant to § 307 of the Clean Air Act, such discretionary duties may only be reviewed by the D.C. Circuit following the Agency's action upon a petition for rulemaking. By contrast, in the instant case, plaintiffs sought relief under § 109(d) of the Clean Air Act which provides that the Administrator *"shall"* review and revise (at five year intervals) the criteria and standards published under §§ 108 and 109. 42 U.S.C. 7409(d). Pursuant to Clean Air Act § 304, a citizen suit to compel this

non-discretionary duty is expressly available in the district courts.

Thus, the outcome in *Oljato* was dictated by the fact that the statute did not impose a non-discretionary duty. It was the absence of such a duty which deprived the district court of jurisdiction under § 304. Moreover, as the court below found,

> Since *Oljato*, . . . the District of Columbia Court has distinguished between those revision provisions in the Act that include stated deadlines and those that do not, holding that revision provisions that do include stated deadlines should, as a rule, be construed as creating non-discretionary duties. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987).

App. 10a. Since *Oljato* has no application to this case, there is no conflict between the two circuits which would warrant review by this Court.

C. The *TRAC* Decision is Inapplicable Here Because the Clean Air Act Contains a Citizen Suit Provision Which Specifically Assigns District Court Jurisdiction To Enforce EPA's Statutory Obligations.

Petitioners argue that the decision below conflicts with yet another decision of the D.C. Circuit, *Telecommunications Research and Action Center v. FCC ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984), which held that "any suit seeking relief that might affect the Circuit Court's future jurisdiction [to review agency actions] is subject to the *exclusive* review of the court of appeals." This purported conflict is not present here because the statutory schemes in *TRAC* and the instant case are markedly different.

In *TRAC*, petitioners sought review directly in the D.C. Circuit to compel FCC action on an administrative petition which the FCC failed to rule on after a five year delay. The statute before the court of appeals in *TRAC*, however, specifically gave the court of appeals exclusive jurisdiction as to final orders of the FCC, but did not address what court had jurisdiction over Agency delay or failure to take action required by law. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). The D.C. Circuit held that it alone had jurisdiction over "claims of unreasonable Commission delay." 750 F.2d at 76.

In stark contrast, the Clean Air Act provides for a bifurcated system of judicial review. The forum varies between the district court and the court of appeals depending upon whether the statute makes EPA action discretionary or nondiscretionary. Under § 304 of the Clean Air Act, Congress expressly gave the district courts jurisdiction to issue orders compelling the EPA Administrator to perform mandatory duties.

The Clean Air Act gives the courts of appeals jurisdiction to review final orders and regulations issued by EPA Administrator. 42 U.S.C. § 7607(b) (1982). This authorizes judicial review of virtually all final action that the Administrator has a mandatory duty to undertake. But, where the Agency has failed to act, enforcement of EPA's mandatory duties in the first instance is left exclusively to the district courts, by the plain terms of § 304(a)(2).

Consequently, the reasoning employed in TRAC—that Congress had "manifested an intent" that the courts of appeals should have exclusive jurisdiction over all suits to compel agency action—is inapplicable to a statute such as the Clean Air Act which carves out a distinct jurisdictional function for the district court. Under the Clean Air Act,

Congress has clearly manifested an intent that the district courts have jurisdiction over suits seeking to compel the Administrator of EPA to perform a mandatory duty. App. 8a, 16a-17a.

Finally, the Environmental Protection Agency agrees with this interpretation of § 304 and the *TRAC* decision. In a brief filed in other litigation, EPA rejected a similar argument advanced by the same parties who filed the petition in this proceeding. The District Court there agreed.

> The review of the failure to perform a nondiscretionary act [under the Clean Air Act] is vested in the district court under § 304. The EPA, which argues contrary to intervenors with respect to this issue, argues in its surreply that intervenors 'can only read *TRAC* into this case by reading § 304 out of the Clean Act.'

State of New York v. Thomas, 613 F. 2d 1472, 1478 (D.D.C. 1985), *rev'd on other grounds,* 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied,* 482 U.S. 919 (1987). The same is true in this case, and petitioners' once failed *TRAC* claim should again be rejected.

CONCLUSION.

The Writ should be denied.

Dated: October 5, 1989

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